No. 83-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEABOARD SYSTEM RAILROAD, INC., *et al.*,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONERS

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In this case, the petitioner railroads have sought review of a Court of Appeals decision which, in conflict with two prior decisions of this Court,[1] held that the District Courts lack jurisdiction to resolve threshold legal issues arising under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45 ("BLBA"). In reply to the Government's opposition to certiorari, four points deserve emphasis.

1. Despite the Government's attempt to wish the conflict away in a footnote (see Gov. Opp. 6 n.4), the conflict between the Sixth Circuit's decision and this Court's decisions in *Turner Elkhorn* and *NICOA* is quite real. In both *Turner Elkhorn* and *NICOA*, District Courts, later reviewed on the merits by this

[1] *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *NICOA* v. *Brennan*, 419 U.S. 955 (1974).

Court, asserted jurisdiction to decide threshold legal claims under the BLBA.[2] That is exactly what the District Court did in this case—before the Sixth Circuit reversed, holding that the District Court lacked jurisdiction.[3] The Sixth Circuit's holding therefore conflicts with this Court's recognition in *Turner Elkhorn* and *NICOA* that District Courts may entertain such claims, and the Government fails to distinguish *either* case.

First, this Court in *Turner Elkhorn* did *not* pass on the jurisdictional issue *sub silentio*, as the Government implies by its reliance on *Pennhurst State School & Hospital* v. *Halderman*, 104 S. Ct. 900 (1984). To the contrary, in *Turner Elkhorn* this Court explicitly recognized a three-judge District Court's jurisdiction over constitutional challenges to the BLBA, and a single District Judge's jurisdiction over challenges to regulations implementing the statute. See 428 U.S. at 13, 37 n.41.[4] Thus, it cannot be said, as in *Pennhurst*, that the jurisdictional issue is "an open one." 104 S. Ct. at 918. This Court in *Turner Elkhorn* expressly recognized and affirmed District Court jurisdiction to decide threshold claims under the BLBA.[5]

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[2] *Turner Elkhorn Mining Co.* v. *Brennan*, 385 F. Supp. 424 (E.D. Ky. 1974); *NICOA* v. *Brennan*, 372 F. Supp. 16 (D.D.C. 1974).

[3] The Sixth Circuit's opinion is reported at 713 F.2d 1243 and appears as Appendix B to the petition for certiorari, and the District Court opinion appears as Appendix D.

[4] Because of the repeal of 28 U.S.C. § 2282 in 1976, both sets of issues would today be within the jurisdiction of a single District Judge.

[5] The Government also suggests that this Court's review in *Turner Elkhorn* does not confirm the District Court's jurisdiction because this Court "had jurisdiction over the appeal under 28 U.S.C. 1252 regardless of whether the district court properly asserted jurisdiction in the first instance." Gov. Opp. 6 n.4. Under Section 1252, however, the Court had jurisdiction to review the District Court's decision on the *merits* only if the District Court itself had jurisdiction to act; otherwise this Court's jurisdiction would have been limited to vacating the judgment below and remanding with directions to dis-

Second, *NICOA* is not deprived of precedential weight on the jurisdictional issue because it was a summary affirmance. As the Government correctly notes (Gov. Opp. 6 n.4), summary decisions extend to all issues "necessarily decided." The issue of a District Court's jurisdiction is necessarily decided when this Court summarily affirms on the merits, and such actions "obviously are of precedential value." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). The Government can argue about how much precedential value should be assigned to *NICOA*; but the decision's implicit acknowledgment of District Court jurisdiction to entertain threshold legal claims under the BLBA, and its conflict with the Sixth Circuit on this point, are beyond dispute.

In all events, the assumption of jurisdiction in *Turner Elkhorn* and *NICOA* cannot be squared with the rejection of jurisdiction by the court below. That is precisely the kind of conflict that this Court sits to resolve. At a minimum, litigants and lower courts are entitled to know which set of signposts are to be followed in the future.

2. Wholly apart from the direct conflict of decisions under the BLBA, certiorari to resolve the jurisdictional issue is further justified by several other considerations. The Government, like the Sixth Circuit, conveniently forgets that District Court review of agency determinations of threshold statutory issues is presumptively available. A cause of action supporting such review has been recognized for almost a century and District Court jurisdiction is clearly provided under 28 U.S.C. §§ 1331 and 1337(a). See Pet. 7-8 & nn.14, 15. This Court has stressed that such review "will not be cut off unless there is persuasive reason to believe that such was the purpose of

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miss. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 418-19 (1982); *Williams* v. *Zbaraz*, 448 U.S. 358, 368 (1980). Since this Court did pass upon the merits in *Turner Elkhorn* (and in *NICOA* as well), it recognized District Court jurisdiction to decide threshold legal claims under the BLBA.

Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

There is no basis in the BLBA or its legislative history to support the conclusion that Congress meant to preclude District Court review of threshold legal claims. Like the Sixth Circuit, the Government mistakenly assumes that, because Congress explicitly provided an exclusive statutory review procedure for a specified class of agency action (individual benefits determinations), District Court review of a *different* class of agency action (general regulations of the Secretary of Labor) is "implicitly" precluded. See Gov. Opp. 7 & n.5.[6] As this Court said in *Abbott*, "the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." 387 U.S. at 141, quoting L. Jaffe, *Judicial Control of Administrative Action* 357 (1965).

Certainly no "tribunal with . . . cumulative experience about arcane regulatory matters" (Gov. Opp. 8) is required to decide the threshold legal question of whether Congress intended railroad employees to be within the BLBA's definition of "miners." Similarly, there is no showing here—as there was in *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965)—that Congress considered and rejected District Court review of such questions. Thus, the relevant Congressional policy is that reflected in the Administrative Procedure Act: a person adversely affected by agency action—here the Secretary of Labor's general misinterpretation of the statute—"is entitled to judicial review thereof." 5 U.S.C. § 702.

The jurisdictional issue in this case is a recurring one and is important to the administration of the BLBA, which governs thousands of present and potential claimants and hundreds of

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[6] No review of an individual benefits determination is involved in this case; petitioners seek a declaration that railroad employees are not included in the definition of "miner" under the BLBA.

millions of dollars in benefits. Through threshold judicial review, a recurring constitutional or statutory interpretation issue can be resolved swiftly by the courts, providing guidance to the Secretary of Labor in subsequent cases.[7] Whether District Court review is available under the BLBA to determine threshold legal questions affecting a large number of claims is an issue that ought to be resolved definitively, even assuming *arguendo* that this Court's prior decisions in *NICOA* and *Turner Elkhorn* did not do so.

3. On the merits, petitioners challenged the Department of Labor regulation that expressly includes railroad employees in BLBA's definition of "miners."[8] The regulation is invalid because Congress explicitly said that the BLBA's definition of "miner" "does not contemplate inclusion of those workers em-

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[7] The Government's suggestion that precluding District Court review will "streamline[ ]" the process (Gov. Opp. 8) is bizarre since it is the Government's resistance to District Court jurisdiction in this case that has created the continuing delay and uncertainty in the interpretation of the statute. Clearly, as this Court recognized in *NICOA* and *Turner Elkhorn*, broad threshold issues, common to a range of potential claims, ought to be subject to judicial review at once. The possibility that there may be some legal issues that do not warrant such treatment is no basis for deferring judicial review where a genuine threshold issue is present. Compare *Compensation Department* v. *Marshall*, 667 F.2d 336 (3d Cir. 1981).

[8] The Government misdescribes the issue by suggesting that petitioners assail the regulation's failure to "exclude" railroad employees from the statute (Gov. Opp. 3), a phrasing that suggests that the Secretary of Labor may not have decided the issue. Quite the contrary, the Secretary of Labor has expressly included railroad employees as "miners" in a series of examples: *e.g.*, "[a] claimant employed by a railroad company to maintain track between the extraction site and tipple," and "[a] claimant who is employed by a railroad company as a conductor on trains which pick up raw, unprocessed coal at a coal mine and carry it to a preparation facility . . . ." Pet. App. 34a.

ployed by a railroad . . . unless such company also operates a mine." S. Rep. No. 95-209, 95th Cong., 1st Sess. 21 (1977).

The Government argues that what the Senate said is immaterial because the Senate bill under discussion "was not enacted." Gov. Opp. 10 n.7. However, the BLBA definition of "miner" was the definition framed by the Senate, and the Conference Committee *adopted* the Senate's language. See Pet. 20 n.31. The fact that the Senate's definition was incorporated into the House bill by the Conference Committee (see *id.*) does not render the Senate's expression of intent any less controlling.

Nothing in the subsequent legislative history suggests any repudiation of the Senate's view, expressed both in the Senate committee report and on the Senate floor by Sen. Randolph, the floor leader for the Senate committee. See Pet. 21 n.32. It is difficult to imagine how Congress could have made any clearer its intent that railroad employees were not to be included in the definition of "miners" under the BLBA. The Secretary of Labor's decision to include such employees under the BLBA despite "the expressed legislative intent to the contrary" (*Consumer Product Safety Comm'n* v. *Sylvania*, 447 U.S. 102, 108 (1980)) is a direct usurpation of power worthy of review by this Court.[9]

4. Contrary to the Government's suggestion (Gov. Opp. 9 n.7), the statutory interpretation issue should be decided by this Court along with the jurisdictional issue. The question whether railroad employees qualify as "miners" under the BLBA, in light of the explicit congressional directive to the contrary, is itself an important and recurring issue in the administration of a major federal program. In *Laing* v. *United*

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[9] Since railroad employees are not miners, the question whether the term "operator" might otherwise embrace railroads need not be reached (compare Gov. Opp. 9 n.7); but in fact, the legislative history shows that the definition of "operator" was not designed to reach railroads but rather to include firms engaged in mine construction or extraction for the benefit of the mine operator. See S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977). See Pet. 22 & n.34.

States, 423 U.S. 161 (1976), this Court, in granting review, took note of the fact that there were 70 pending cases dependent on the resolution of the issue involved. In the present case, it appears that there are already well over 1000 claims for black lung benefits filed by present or former railroad employees against the railroads. See Pet. 6.

In addition, the amount of money involved is enormous. Each individual claim represents a potential liability of about $150,000 so that, even without regard to future claims, claims filed thus far could represent over $150 million in liability. In *Commissioner* v. *Standard Life & Accident Ins. Co.*, 433 U.S. 148 (1977), this Court observed that over $100 million was in dispute. Furthermore, Congress' intended exclusion of railroad employees from BLBA almost certainly reflected the fact that railroad employees are covered by other federal statutes not applicable to ordinary miners. The Secretary of Labor's ruling in this case creates a risk both of double liability for railroads and of double recovery by their employees. See Pet. 21 & n.33

Finally, the statutory issue should be resolved now because it is contrary to every precept of sound judicial administration to defer a decision on the merits. Without a simple yes or no answer to the statutory question presented, hundreds of cases may progress through the administrative process, additional suits will will be pursued through different Courts of Appeals, there will be vast expenditures of time and money in litigation, and the railroads' financial liability will remain uncertain for a period of years. Thus, there is a common thread connecting the jurisdictional and the statutory issues presented in this case: the same concerns that in general warrant District Court jurisdiction to resolve legal threshold issues under the BLBA also specifically support a definitive ruling on the merits of this case by this Court at the earliest possible time.

CONCLUSION

For the foregoing reasons, as well as for those set out in the petition, certiorari should be granted.

Respectfully submitted,

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